

E FILED ON 7/26/12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA.,

Plaintiff,

v.

KEVIN DUGAN,

Defendant.

NO. CR-03-20010-RMW

ORDER DENYING MOTION RE
ALLEGED FAILURE TO CONSIDER
REPLY

[Docket No. 424]

Defendant Kevin Dugan has filed a *pro se* motion claiming that "a manifest injustice" has occurred in that neither this court nor the government considered a reply memorandum that his then attorney Scott Furstman allegedly filed on March 12, 1998 ("March 12, 1998 Reply" or "Reply")¹. Although the Reply was file-stamped indicating that it was filed on March 12, 1998, the docket does not show the filing. Defendant does not state what remedy he seeks for the alleged failure to consider the Reply.

The Reply makes two assertions: (1) that the evidence did not support the jury's finding that defendant possessed more than 1000 marijuana plants; and (2) that 18 U.S.C.

¹The undersigned believes he had a copy of the March 12, 1998 Reply at the time he heard defendant's new trial motion but he is not 100% certain.

1 § 922(g)(3), the subject of one of the counts of which defendant was found guilty, is
2 unconstitutionally vague as to what constitutes an "unlawful user" or "addict." Defendant's
3 motion is frivolous for a number of reasons. First, the court agreed that the evidence did
4 not support a finding that the defendant possessed 1000 or more marijuana plants and set
5 that finding aside (Docket # 311). Second, the issue was raised in Attorney Furstman's
6 original notice of motion for new trial (Docket # 217); was raised and thoroughly briefed by
7 Attorney Riordon who defendant hired with respect to the new trial motion (Docket # 281)
8 and was briefed by Dugan himself after he had discharged his previous attorneys (Docket #
9 303).

10 The argument in the Reply that 18 U.S.C. § 922(g)(3) is unconstitutional was fully
11 addressed in Attorney Riordon's brief and considered and rejected by both this court
12 (Docket # 311) and the Ninth Circuit (*United States v. Dugan*, 450 Fed. Appx. 633001 (9th
13 Cir. 2001)).

14 Dugan's motion is denied. The Reply is now in the record as Docket # 424, pages
15 2-5.

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17 Dated: July 26, 2012

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19 RONALD M. WHYTE
20 United States District Judge
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